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No. 99-1748

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM LEE WILEY

Petitioner,

v.

STATE OF MISSISSIPPI

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner William Lee Wiley, laboring under a sentence of death, respectfully submits this reply to the State's Brief in Opposition.

I. APPELLATE COUNSEL'S FAILURE TO CHALLENGE THE APPLICATION OF MISSISSIPPI'S "AVOIDING ARREST" AGGRAVATING FACTOR WAS DEFICIENT AND PREJUDICIAL.

If William Wiley's crime falls within the "avoiding arrest" aggravating factor, then so does virtually any murder committed in Mississippi. The State contends that Wiley's appellate counsel was not deficient and did not prejudice Wiley in failing to challenge the finding that he "purposefully kill[ed] the victim of an underlying felony to avoid or prevent arrest for that felony," as would be required to satisfy this aggravating factor. *Gray v. Lucas,* 677 F.2d 1086, 1109-10 (5th Cir. 1982); MISS. CODE ANN. § 99-19-103. The sole basis for the State's contention is "that there was sufficient evidence upon which to find this aggravating factor." Opp. at 16. A review of the record, however, demonstrates that no such evidence exists and that the State is therefore relying on an impermissibly broad construction of "avoiding arrest" to defeat Wiley's *Strickland* claim.

A. The Record Does Not Support a Finding of "Avoiding Arrest."

The evidence in this case is remarkably clear. There is no dispute that Wiley knowingly left one of the shooting victims alive as he fled the crime scene. Moreover, this witness was acquainted with Wiley, and therefore he knew that she could identify him. Thus, his decision not to kill this witness belies any contention that the crime was committed to "avoid arrest." *Cf. Livingston v. State*, 565 So.2d 1288, 1292 (Fla. 1988) (interpreting Florida's "avoiding arrest"

aggravating factor to be inapplicable when crime victims are knowingly left alive at the scene). Research reveals no case prior to this one where a Mississippi court, or any other court, has upheld the application of an "avoiding arrest" factor when a defendant left alive a potential witness other than an accomplice. Appellate counsel's failure to raise this obvious point was deficient and certainly creates at least a "reasonable probability" that the outcome on appeal would have been different but for counsel's deficient performance. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Furthermore, there is no suggestion that Wiley took any steps to avoid arrest, either before or after the killing. In fact, when confronted by police shortly after the crime, Wiley immediately confessed and then assisted police with their inquiries. The State's only response is that Wiley dropped evidence (including the murder weapon and the stolen money) in portions of the crime scene that had "some weeds" or "dense undergrowth." Opp. at 16. But this cannot establish beyond a reasonable doubt that the killing was committed to "avoid arrest" -- particularly when Wiley left a sobbing witness alive at the scene.

B. This Application of the "Avoiding Arrest" Aggravating Factor was Overbroad.

If Wiley's crime is deemed sufficient to fall within the "avoiding arrest" aggravating factor as defined by the Mississippi courts, then the definition of that factor is unconstitutionally overbroad. *See, e.g., Maynard v. Cartwright,* 486 U.S. 356 (1988); *Godfrey v. Georgia,* 446 U.S. 420 (1980). Counsel's failure to raise this issue on

direct appeal also violated Wiley's rights under *Strickland* and merits review.[1]

A construction of the "avoiding arrest" factor that includes the facts of this record violates this Court's settled requirement that aggravating factors must "genuinely narrow the class of persons eligible" for a death sentence. *Arave v. Creech*, 507 U.S. 463 (1993); *Zant v. Stephens*, 462 U.S. 862 (1983). Nothing distinguishes Wiley's crime from virtually any other first-degree murder. Any killing inherently involves the elimination of a witness to the crime; but obviously that cannot be enough to support a constitutional construction of the "avoiding arrest" factor. Similarly, the fact that Wiley fled the scene after the killing cannot constitutionaly support a finding that he acted to "avoid arrest"; virtually any killer leaves the crime scene. Further, most killers do not leave the evidence behind, as Wiley did here.

The State's rebuttal consists almost entirely of a swarm of Mississippi cases that stand for the proposition that "the mere killing of the victim does not automatically give rise to this aggravating circumstance." Opp. at 20-22. Thus, the State contends that the Mississippi Supreme Court has been mindful of this Court's admonition to narrow the scope of the "avoiding arrest" aggravating factor and that any effort by Wiley's counsel to raise this issue would have been futile.

Wiley does not contend that the Mississippi courts always apply the "avoiding arrest" factor in an overbroad

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[1] The State's contention that Wiley's overbreadth claim was procedurally barred on direct appeal is meritless. Opp. at 18. The Mississippi Supreme Court did not even suggest that Wiley's claims regarding the avoiding arrest instruction were defaulted.

fashion. An examination of the facts in the cases cited by the State, however, demonstrates that the application of this factor in this case was overbroad.

"Avoiding arrest" in Mississippi capital cases generally involves the elimination of all potential witnesses, or serious steps taken to destroy evidence of the crime. *See, e.g.*, *Evans v. State*, 725 So.2d 613 (Miss. 1997) (avoiding arrest aggravating factor justified when defendant took victim to secluded spot, covered her mouth with duct-tape to muffle her cries, then dumped her body in a secluded spot); *Carr v. State*, 655 So.2d 824 (Miss. 1995) (defendant killed all four potential witnesses and then burned down the victim's house to destroy the evidence). In these examples, a clear distinction can be drawn between death-eligible defendants and those who are not death-eligible based on affirmative, calculated, deliberate steps to avoid detection and arrest.

In this case, by contrast, there is no meaningful way to differentiate Wiley's crime from virtually any other murder. Accordingly, the application of the "avoiding arrest" aggravating factor, on this record, was unconstitutionally overbroad under *Zant* and *Arave*. Counsel's failure to raise this claim was deficient and prejudicial.

C. This Application of the "Avoiding Arrest" Aggravating Factor was Impermissibly Duplicative.

The application of duplicative aggravating circumstances is unconstitutional because such aggravating factors do not "genuinely narrow the class of persons eligible for the death penalty." *Arave*, 507 U.S. at 474. In this case, the avoiding arrest and robbery aggravating factors are

indistinguishable. Counsel's failure to raise this claim was a clear violation of *Strickland* and merits review.[2]

If ever there was a typical robbery-murder, this is it. Wiley accosted the victims outside their store, took the owner's money, and then killed him. There is no question that these facts are sufficient to support a robbery aggravating factor. Applying the "avoiding arrest" aggravating factor on this record, however, would require an interpretation of "avoiding arrest" that would effectively encompass all robbery-murders. Anytime that a robbery is committed, it could be said that the killing of the robbery victim was to "avoid arrest" for the robbery. This kind of sentencing redundancy is not permitted in capital cases.

The State responds with only a blanket statement that this claim is "meritless." That is no answer. At best for the State, the jury could have concluded that Wiley acted to avoid arrest by killing his robbery victim -- a fact inherent in any capital murder involving robbery. This unconstitutional double-counting stands effectively unanswered by the State. Accordingly, counsel's failure to challenge the duplicative application of the aggravating factors in Wiley's case was constitutionally deficient and prejudicial.

II. THE MISSISSIPPI SUPREME COURT ERRED IN HOLDING THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO THE STATE'S "SEND A MESSAGE" ARGUMENT DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL.

The failure of Wiley's trial counsel to object to the State's inflammatory "send a message" argument at the

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[2] The State's assertion that this claim was procedurally barred on direct appeal is without merit. Opp. at 19; *see supra* note 1.

sentencing trial plainly deprived him of his right to the effective assistance of counsel. The Mississippi Supreme Court's decision to the contrary conflicts with this Court's decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Strickland* and should be reviewed.

In his closing argument at the sentencing trial, the prosecutor repeatedly implored the jury to impose a death sentence as a message to other potential criminals. He called for a "citizen reaction" that would "make it crystal clear" to the defendant "and to anyone else for that matter" that violent crimes would not be tolerated. In essence, the prosecutor urged the jury to elevate considerations of general deterrence over the particular circumstances of the case before it.

Wiley's counsel did not object, even though the State's tactic clearly violated the longstanding constitutional principle that death sentences must be based solely upon considerations of the individual case and the defendant being sentenced. *See Lockett*, 438 U.S. at 605; *accord Graham v. Collins*, 506 U.S. 461, 468 (1993); *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987); *Zant*, 462 U.S. at 879. Trial counsel's failure to object was objectively unreasonable and undoubtedly prejudiced Wiley by permitting the jury to consider factors having nothing to do with Wiley or his crime.

Nevertheless, the Mississippi Supreme Court concluded that trial counsel's failure to object was not ineffective because the "send a message" argument occurred at the sentencing phase of trial, rather than in the consideration of guilt or innocence. *Wiley v. State*, 750 So.2d 1193, 1210 (Miss. 1999) (citing *Wells v. State*, 698 So.2d 497 (Miss. 1997)). This distinction has no support in logic or in previous decisions of this Court. The death penalty cannot be imposed on the basis of factors -- in the sentencing phase of trial -- that are unrelated to the individual crime or defendant. The constitutional deprivation at issue -- the

subordination of individualized sentencing considerations to broad societal goals -- is present to the same degree regardless of whether the "send a message" argument is employed at the guilt or sentencing phase.

Indeed, this Court has expressly recognized that it is the unique nature of the sentence, not the potential for erroneous guilt determinations, that mandates individualized sentencing in capital cases. The Court in *Lockett* held:

> Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.

Lockett, 438 U.S. at 605; *see also Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

Notably, the State does not even attempt to reconcile the lower court's decision with this authority. Instead, the State's Brief in Opposition quotes at length from *Wells* -- the very state court decision attacked as unconstitutional in Wiley's Petition -- and concludes that counsel was not ineffective because the underlying substantive claim was ultimately deemed meritless by the Mississippi Supreme Court. Opp. at 25-26. This argument misses the point: It is Wiley's contention, as expressly argued in his Petition, that

the Mississippi Supreme Court's decisions in *Wiley* and *Wells* are inconsistent with U.S. Supreme Court precedent. Thus, to cite those cases in response is no answer.

The State's "send a message" argument impermissibly encouraged the jurors to abandon the individualized sentencing required by the Constitution. Trial counsel's failure to recognize this egregious violation was constitutionally deficient and prejudicial under *Strickland*. Accordingly, the decision of the Mississippi Supreme Court should be reviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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